87-357

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF ARKANSAS ..... *Petitioner*

vs.

EDWARD CHARLES PICKENS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED

WHETHER THE EIGHTH AMENDMENT (AS APPLIED THROUGH THE FOURTEENTH AMENDMENT) REQUIRES THAT A DEFENDANT WHO IS FACING RESENTENCING IN A CAPITAL CASE HAVE THE OPPORTUNITY TO PUT BEFORE THE JURY EVIDENCE OF HIS PAST GOOD BEHAVIOR ON DEATH ROW IF SUCH AN OPPORTUNITY OCCURS AT RANDOM.

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This Court should grant certiorari because the Arkansas Supreme Court applied this Court's decision in *Skipper v. South Carolina*, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) in such a way as to produce a capital sentencing process in Arkansas that violates the Eighth Amendment in that the process gives certain defendants, on a random basis, an advantage in avoiding the death penalty.

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No. _____

STATE OF ARKANSAS ..... *Petitioner*

vs.

EDWARD CHARLES PICKENS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The State of Arkansas, the petitioner herein, respectfully prays for this Court to grant a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported as *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987) and is reprinted in Appendix A attached hereto.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on June 1, 1987. Petitioner the State of Arkansas' petition for rehearing was denied by the Arkansas Supreme Court on June 29, 1987. On July 24, 1987, Justice Blackmun granted an extension of time until August 30, 1987, for petitioner to file a petition for writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> "[N]or cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Pickens v. State, 292 Ark. 362, 730 S.W.2d 230 (1987) is a death penalty case. An Arkansas jury resentenced respondent Pickens to death in September, 1985 for a murder that Pickens had committed in the course of a robbery in October, 1975. Earlier, in 1976, an Arkansas jury had sentenced Pickens to death for the October, 1975 robbery-murder. Pickens' conviction and first death sentence were affirmed by the Arkansas Supreme Court in *Pickens v. State*, 261 Ark. 756, 551 S.W.2d 212 (1977), *cert. denied*, 435 U.S. 909 (1978). Subsequently, in 1983, the United States Eighth Circuit Court of Appeals, in an appeal from a habeas corpus action brought pursuant to 28 U.S.C. §2254, vacated Pickens' death sentence on the ground of ineffective assistance of counsel in the sentencing phase of his state capital trial. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983). The Eighth Circuit affirmed Pickens' guilt of the crime of capital murder.

Pickens directly appealed his September 1985 resentence to death to the Arkansas Supreme Court. The Arkansas Supreme Court reversed in *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987). The Arkansas Supreme Court reversed on two grounds: (1) the trial court had violated Pickens' Eighth Amendment right to put mitigating evidence before the jury and (2) the trial court had erred in refusing to excuse two veniremen for cause. Petitioner the State of Arkansas is seeking review by this Court only on the Eighth Amendment ground for reversal. With respect to its reversal on Eighth Amendment grounds, the Arkansas Supreme Court stated that it was bound to reverse on this basis by this Court's holding in *Skipper v. South Carolina*, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In *Skipper*, this Court interpreted and applied the Eighth Amendment (via the Fourteenth Amendment) of the Constitution. Specifically, the Arkansas Supreme Court held that *Skipper*'s interpretation of the Eighth Amendment was

binding authority and that *Skipper*'s holding mandated that Pickens be permitted to put into evidence, as mitigation, proof of his good behavior while incarcerated on death row. Because the trial court had not permitted Pickens to do so, the Arkansas Supreme Court reversed Pickens' death sentence.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ARKANSAS SUPREME COURT APPLIED THIS COURT'S DECISION IN SKIPPER V. SOUTH CAROLINA, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) IN SUCH A WAY AS TO PRODUCE A CAPITAL SENTENCING PROCESS IN ARKANSAS THAT VIOLATES THE EIGHTH AMENDMENT IN THAT THE PROCESS GIVES CERTAIN DEFENDANTS, ON A RANDOM BASIS, AN ADVANTAGE IN AVOIDING THE DEATH PENALTY.

The Eighth Amendment to the United States Constitution prohibits application of any death penalty statute in any way that is wholly freakish, arbitrary or capricious in its results.[1] *Booth v. Maryland*, 428 U.S. ___, 107 S.Ct. 2529, 2532, 96 L.Ed.2d 440, 448 (1987); *Pulley v. Harris*, 465 U.S. 37, 44-5 (1984); *California v. Ramos*, 463 U.S. 992, 999 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (plurality opinion) and *Furman v. Georgia*, 408 U.S. 238, 293-95 (1972) (concurring opinion). Death penalties may not be visited upon defendants in the freakish way that lightning strikes. *Furman, supra* at 309 (concurring opinion). The interpretation of the Eighth Amendment adopted by the Arkansas Supreme Court in *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987) must inevitably produce death sentences imposed in a wholly arbitrary and freakish way.

At present, inmates are on death row for at least eight years

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[1]The due process clause of the Fourteenth Amendment incorporates the Eighth Amendment's prohibition against cruel and unusual punishment; therefore, the Eighth Amendment's prohibition is obligatory on the fifty states. *Robinson v. California*, 370 U.S. 660 (1962).

or more on the average. I. Robbins, *Prisoners and the Law* 8-3 (1985). Between January 1, 1982 and October 1, 1985, approximately 45% of all death penalties were reversed at some stage in the state and federal appellate process. Greenberg, *Against the American System of Capital Punishment*, 99 Harv. L. Rev. 1670, 1672 (1986). According to the Arkansas Supreme Court's interpretation of the Eighth Amendment, Pickens should have the chance to present to a jury on resentencing his past good behavior on death row as mitigation. This opportunity to present eight or more years' worth of mitigating evidence is a blessing bestowed on some death row inmates and withheld from others in an entirely arbitrary and freakish manner. The random occurrence of reversible error in their trials or their sentencing hearings is the lightning's strike.[2] From the perspective of the pool of all death row

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[2]As a statistical matter, reversible errors occur randomly within a system when all possible reversible errors have an equal probability of occurrence. D. Barnes and J. Conley, *Statistical Evidence in Litigation* 253-54 (1986). The occurrence of reversible error in a trial is random in this sense because a trial as a system is neutral — it does not favor the occurrence of any particular reversible error and it has no goal or object other than the proper functioning of the system itself. As a system, a trial is neutral because the rules of evidence and court procedure do not favor either side and do not vary with factors such as the experience of counsel, the strength of the state's case or the community's abhorrence of the offense with which the defendant is charged. As a structured system, a trial presupposes counsel for both sides and a trial judge who know the neutral rules of evidence and procedure and follow them in order that the system will function properly. Because the rules of evidence and court procedure favor neither one side nor the other and because they remain constant as a particular trial progresses, the trial, as a structured system, does not incline toward reversible error. Error, if it occurs, is not a product of the neutrally structured trial, but is a product of human factors extrinsic to the trial structure itself, such as defense counsel's incompetence, the prosecuting attorney's overzealousness, the trial judge's ignorance of the law and the like. Although counsels' and the trial judge's incompetence, overzealousness and ignorance of the law can manifest themselves during trial, incompetence, overzealousness

inmates, these opportunities to present additional mitigating evidence occur entirely at random, with no regard for the character or record of each individual or the circumstances of his crime. These additional opportunities to present mitigating evidence are just as random as the aggravating factors of the character and reputation of the victim and the articulateness of the victim's family found to be violative of the Eighth Amendment by this Court in *Booth v. Maryland, supra*. For a hypothetical death row inmate whose court proceedings were not free of reversible error, according to the Arkansas Supreme Court's interpretation of the Eighth Amendment there exists for this inmate the chance to avoid the death penalty by telling the jury on resentencing of his good behavior while on death row. For a hypothetical death row inmate whose court proceedings were free from reversible error, though he began his stay on death row rotten with evil and filled with hate but gradually came to live the godly life of gentle St. Francis of Assisi, he must go to his grave with no chance to tell a jury of his spiritual triumph. The Eighth Amendment of the United States Constitution forbids such an arbitrary result as between the inmate who just happened to have reversible error occur during his trial and the hypothetical St. Francis of death row who was not so lucky. The Arkansas Supreme Court's interpretation of the Eighth Amendment that arbitrarily enables a defendant to tell the jury on resentencing of his good behavior on death row must inevitably produce arbitrary and freakish impositions of the death penalty in Arkansas.

The Arkansas Supreme Court stated that its reversal of the instant case was compelled by this Court's holding in *Skipper*

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[2](cont'd) and ignorance of the law are not part of the trial's formal structure nor are they a product of this formal structure. Insofar as the formal structure of a trial is concerned, the occurrence of these reversible errors is just as likely as not. As between two trials or more, if the probability of reversible error is equal, then reversible error occurs in the trials at random.

v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).[3] In reversing respondent Pickens' death sentence, the Arkansas Supreme Court failed to properly analyze this Court's holding in *Skipper*. Petitioner contends that this Court's analysis in *Skipper* is not contrary to the petitioner's position and, in fact, supports it if *Skipper* is properly analyzed. In *Skipper*, this Court held that a defendant in a capital case could present to the jury at his sentencing hearing evidence of his good behavior in jail over a seven month period while waiting for his trial to begin. This sentencing hearing was that defendant's *first* sentencing hearing, as opposed to the sentencing hearing in the instant case, which was respondent Pickens' second. All defendants have the opportunity to present to the jury evidence of their conduct in jail while awaiting trial because, by definition, all defendants live through a period of time after their arrest but before their trial. Because all death row inmates have this uniform opportunity to behave themselves during this period of time and thereafter to present evidence of their good behavior to the jury, admission of this evidence does not arbitrarily advantage some defendants, but not others. On the other hand, only some death row inmates, like Pickens, tossed out at random by the state and federal appellate process, have the opportunity to tell a jury of their good conduct while on death row. These erratic opportunities to present additional, post-sentence mitigation, if permitted by other state supreme courts that follow the Arkansas Supreme Court's decision in the instant case, will produce capricious, arbitrary and freakish results in the application of the death penalty over a period of years. That this contention must be so becomes clear if this Court will

[3]This Court's analysis in *Skipper* was sharply criticized by Justices Powell, Rehnquist and then Chief Justice Burger in a concurring opinion in *Skipper*. These Justices concurred in the result only. This Court's analysis in *Skipper* was also sharply criticized by Justices Powell, O'Connor and Chief Justice Rehnquist in a dissenting opinion in *Truesdale v. Aiken*, 480 U.S. ___, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987).

consider the following proposition: assuming that respondent Pickens' good conduct on death row had been the same, would he be any more or less deserving of death if he had never received an appellate nullification of his original death sentence? In the negative answer to this question, the Eighth Amendment error made by the Arkansas Supreme Court is as stark as the strike of lightning.

The Eighth Amendment does not require that death row become a cloister for humble good works and a lifetime's quiet reflection. This Court should grant the instant petition, reverse the decision of the Arkansas Supreme Court and hold that the State of Arkansas may, consistent with the Eighth Amendment and with *Skipper*, declare as a matter of statute that the jury's first verdict of death and the concomitant beginning of the defendant's stay on death row is the end of a capital defendant's opportunity to produce evidence suggesting that he should not be sentenced to death. Such a decision by this Court will not prejudice a defendant like Pickens on resentencing. Such a decision will only place Pickens where he was before, the first time he faced a jury and stood for his reckoning. Such a decision will place Pickens on the same footing with death row inmates who never have the opportunity to appear a second time before a jury. The Eighth Amendment commands that Pickens not have a random, freakish advantage over his fellow death row inmates in escaping the death penalty. The Arkansas Supreme Court's interpretation of the Eighth Amendment arbitrarily gives Pickens such an advantage in avoiding the death penalty and is, therefore, violative of the Eighth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Edward Charles PICKENS *v.* STATE of Arkansas

CR 86-42

Supreme Court of Arkansas
Opinion delivered June 1, 1987

Appeal from Prairie Circuit Court, Southern District; *Cecil A. Tedder*, Judge; reversed and remanded.

Achor & Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

Ton Glaze, Justice. On October 20, 1975, several people were sh t in a robbery of a grocery store in Arkansas County. Three people were charged in the case, one being appellant. Venue for appellant was changed to Prairie County, where appellant subsequently was convicted of the capital felony murder of Wesley Noble, one of the customers in the store. Appellant was sentenced to death. The conviction and sentence were upheld in *Pickens* v. *State*, 261 Ark. 756, 551 S.W.2d 212 (1977). In *Pickens* v. *Lockhart*, 714 F.2d 1455 (8th Cir. 1983), appellant's death sentence was vacated because of ineffective assistance of counsel, and remanded to state court to permit it to reduce appellant's sentence to life without parole or to conduct a new sentencing procedure. A resentencing trial took place in Prairie County Circuit Court in September 1985, and appellant was again sentenced to death. He appeals this new sentence, listing ten points for reversal. Some of these ten points include an additional number of sub-issues or reasons why appellant claims this cause should be reversed. Because we agree with appellant's first argument, we decide and discuss only those points which are required for the remand and retrial of this case.

Appellant's first argument centers on his having been

found guilty of capital murder, after which, the jury, during the penalty phase, unanimously imposed the death sentence. In doing so, the jury was required to find that the aggravating circumstances of the murder outweighed all mitigating circumstances found to exist and the aggravating circumstances justified a sentence of death beyond a reasonable doubt. Ark. Stat. Ann. §§ 41-1301(3)(4) and -1302(1) (Repl. 1977). Appellant argues that the trial court erred in limiting appellant's proof concerning mitigating circumstances to those circumstances that existed in October 1975, the time of the murder. In this respect, appellant contends that the trial judge should have allowed him to introduce the testimony of various witnesses regarding character, rehabilitation, adjustment to prison and good works he had undergone or performed since the murder occurred.

In support of this argument, appellant relies upon the Supreme Court's recent holding in *Skipper* v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986). In *Skipper*, the trial court excluded the testimony of two jailers and a "regular visitor" regarding the defendant's good behavior while he was in jail for seven months awaiting trial. The Supreme Court held the trial court's exclusion of such testimony denied Skipper his right to place before the sentencer relevant evidence in mitigation of punishment. The Court said: "Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, [cite omitted], there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'." 106 S.Ct. at 1671.

The State argues the *Skipper* decision should be limited to its facts and suggests a temporal limit exists that precludes a defendant from offering mitigating circumstances which arise after the jury decides the defendant is guilty of capital murder. The State submits to construe the *Skipper* holding otherwise

would permit defendants, who are able to extend their appeals and post-conviction relief processes the longest, an opportunity to collect evidence in mitigation that, in time, is far removed from the circumstances of the crime, as well as from what their characters were when they committed the offense. Such an open-ended procedure, the State suggests, bestows on some death-row inmates the opportunity to accumulate mitigating evidence while others may not be so fortunate. In sum, the State concludes that to permit such erratic opportunities to present additional, post-sentence mitigation would produce capricious, arbitrary and freakish results in the application of the death penalty in Arkansas for years.

While the State's argument seems based on sound logic and reason, its position is not unlike the one argued to and rejected by the Court in the *Skipper* case. The *Skipper* majority Court's holding, and its effect on the mitigating evidence issue before us now, can best be understood by first reading Justice Powell's concurring opinion, joined in by then-Chief Justice Burger and Justice Rehnquist. Those concurring Justices clearly stated that they joined in reversing the South Carolina trial court not because it excluded "relevant mitigating evidence" but only because the petitioner was not allowed to rebut evidence and argument used against him. Otherwise, the concurring Justices strongly disagreed with the majority Court holding that a defendant's conduct after the crime should be considered "mitigating evidence" and that the sentencer must consider such conduct under the Constitution. Justice Powell concluded:

> I see no reason why a State could not, consistent with these principles, exclude evidence of a defendant's good behavior in jail following his arrest, as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here. *Such evidence has no bearing at all on the "circumstances of the*

offense," since it concerns the defendant's behavior after the crime has been committed. (Emphasis supplied.)

Again, the majority Court in *Skipper* rejected Justice Powell's expressed views that a state should have the right to exclude evidence of a defendant's conduct while awaiting trial or sentencing. In doing so, the majority placed emphasis not on the defendant's culpability for the crime he committed, but instead it held the sentencer should be able to consider *any aspect of a defendant's character or record* or any of the circumstances of the offense that the defendant proffers "as a basis for a sentence less than death." It said further that evidence that the defendant would not pose a danger if spared (but incarcerated) must be potentially mitigating.

We believe the *Skipper* decision mandates, in clear terms, that any relevant mitigating evidence concerning a defendant's character should not be excluded. That evidence may include, as the situation here, the defendant's behavior and conduct that existed not only before and at the time of the crime, but also that which occurred before sentencing and during the period of post-conviction relief, should a later resentencing occur. Accordingly, we reverse and remand this cause for resentencing to be conducted consistent with the *Skipper* holding and this court's opinion.

Appellant raises one other meritorious argument. In this respect, appellant argues the trial court erred in refusing to excuse certain jurors for cause, two of them because they indicated they would automatically impose the death penalty if appellant were convicted of murder. The State made every effort to rehabilitate one of those two jurors by leading him to say, "No, sir," when asked, "Now, we have to be fair, so in the other vein, life without parole is also a possible penalty, so you haven't got your mind made up at all that all capital murder deserves [the] death penalty?" Even after such efforts by the

prosecutor, this witness repeatedly said that if appellant (or anyone) was guilty of murder (or rape), "I would burn them" or "be for the death penalty." As we pointed out in *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980), a prospective juror's candid answers cannot be overcome merely by routine responses, and there is a point beyond which such a juror cannot be rehabilitated. We believe that situation occurred here and, accordingly, presents another reason why this cause must be reversed.[1]

The Supreme Court has said that a venireman should not be excluded unless he is irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. *See Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 68 (1983) [quoting from *Davis* v. *Georgia*, 429 U.S. 122 (1976)]. By the same token, a venireman who is automatically committed to imposing the death penalty is, for the defense, good cause for that juror's exclusion from service. Clearly, proper inquiry on voir dire in the matter would be to ask the veniremen if they would first consider and weigh the aggravating and mitigating circumstances involved when determining whether death or life imprisonment without parole should be imposed.

Before turning to appellant's other points, we mention briefly those we do not reach. Appellant argues that the jurors, in rendering appellant's sentence, erroneously found the appellant had presented no evidence of mitigating circumstances. If error occurred in this instance, such error may readily be avoided at the retrial and we need not discuss it.

Similarly, we need not reach appellant's contention that

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[1]We note the appellant peremptorily excused the veniremen discussed here, but appellant preserved his record on this point by showing an objectionable juror was later forced upon him because he had exhausted all his peremptory challenges. *Cf. Stephens* v. *State*, 227 Ark. 113, 640 S.W.2d 94 (1982).

the trial court erred in permitting the jury to consider the aggravating circumstance that appellant committed capital murder for pecuniary gain. Appellant presents a two-pronged argument: (1) the jury, which determined appellant's guilt at the original trial, also found that the murder the appellant committed was not for pecuniary gain, and appellant urges that to allow another jury, upon resentencing, to consider pecuniary gain as an aggravating circumstance violates the principle of double jeopardy; and (2) citing *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S.Ct. 546 (1985), appellant argues his conviction was for robbery-murder, a crime that included pecuniary gain as an element, and he suggests that if the court permits the State to prove the aggravating circumstance of murder for pecuniary gain for sentencing purposes, the court improperly permits the double counting of one aspect of the evidence. Because this cause is reversed on other grounds and three other aggravating circumstances remain available to the State, we need not presume or anticipate that this issue will arise at the resentencing trial.

Appellant does attack one of the other remaining three aggravating circumstances, and we do dispose of that argument since we conclude it is wholly without merit. The jury found the appellant committed capital murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody — an aggravating circumstance under Ark. Stat. Ann. § 41-1303(5). Appellant contends this circumstance is vague and overbroad as applied to the facts of this case. We consider this contention spurious in view of the overwhelming evidence that the appellant and his accomplices repeatedly shot their victims during the robbery while they laid helplessly on the floor of the store. One victim, Harold Goacher, testified the appellant and his accomplices asked if there was a room in which they could lock up their victims and when they were told no, Goacher said, "they turned around and said well, hell, we

were (sic) just going to have to do away with them because if they get loose they will burn us." Unquestionably, the record supports the conclusion the appellant and his cohorts intended to kill their victims in order to avoid identification, apprehension, arrest and conviction for the robbery.[2]

Appellant next argues the unconstitutionality of Ark. Stat. Ann. § 41-1358 (Supp. 1985), contending that its retroactive application here violates (1) the *ex post facto* clause, (2) the equal protection clause and (3) the double jeopardy prohibition. He argues further that the provision is a special law forbidden by Ark. Const. art. 5, § 24.

Section 41-1358 provides that a capital case is remanded to the court where the defendant was originally sentenced when a death sentence is vacated, and the prosecutor may move the trial court to impose a life sentence without parole or to impanel a new sentencing jury. Appellant claims that, prior to § 41-1358 (enacted as Act 546 of 1983), he would have been allowed by law, when a penalty phase error occurred, to a reduction in sentence to life without parole or a retrial as to both the guilt and any resulting sentencing phase. On this point, appellant primarily relies upon *Miller* v. *State*, 280 Ark. 551, 660 S.W.2d 163 (1983). The State, in its argument, correctly distinguishes *Miller* from the instant case but the significant distinction is that this cause involves a remand by the federal court to the state trial court for resentencing, not a retrial on the guilt issue. Aside from such differences, the Supreme Court, in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), held that a procedural change in a state's death-sentencing law is not an *ex post facto* violation, nor does such a change deny a defendant the equal

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[2]Appellant also contends on appeal that it was error to permit the State to prove this aggravating circumstance because it was not found by the jury in his co-defendant's sentencing trial. Although he raised this issue below, we find nothing in the record, nor does he offer any citation of authority, to support his argument.

protection of the laws. In *Dobbert*, the Court concluded that the newly-enacted law there simply altered the methods employed in determining whether the death penalty was to be imposed and no change occurred regarding the quantum of punishment attached to the crime. The same can be said for the situation here. The crime for which appellant was charged, the punishment prescribed for it, and the quantity or degree of proof necessary to establish his guilt, all remain unaffected by § 41-1358. In sum, the State's position is in no way enhanced by § 41-1358, since it may not, under that new law, seek any greater penalty or punishment against the appellant for the crime he committed than that which was available under the prior law.

Appellant further urges § 41-1358 permitted the State at the resentencing trial to present additional evidence not presented at the original trial; this, he suggests, violates the double jeopardy prohibition under the fifth amendment. In this connection, Jerry Lockridge, one of the robbery victims, testified at the resentencing trial, but had not testified at appellant's first trial because Lockridge was in Europe at the time. A similar question of double jeopardy to the one presented here was considered in *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957). The Court, in language that is particularly instructive here, said:

> It is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence.

355 U.S. at 243.

We are unaware of any reason why the State should be precluded from introducing additional relevant evidence on

remand at a resentencing trial, especially when appellant's guilt already has been established and when appellant has in no manner shown or demonstrated prejudice that would result from the admission of such evidence.

Finally, appellant asserts Ark. Const. art. 5, § 24 prohibits the General Assembly from passing any local or special law changing the venue in criminal cases, and the General Assembly, appellant says, did just that here since § 41-1358 effectively requires this case to be remanded to Prairie County and not Arkansas County, where the crime was committed in 1975. Appellant's argument is far afield since the parties, themselves, agreed to a venue change to Prairie County when this cause was originally tried. Thus, § 41-1358 had nothing to do with fixing venue in this matter; instead, it merely reinvests venue for resentencing purposes in the county the parties agreed on in the first instance.

Next, appellant's counsel argues the trial court erred in the application of Ark. Stat. Ann. § 43-2419 (Repl. 1977) which provides for fees for attorneys representing indigents in criminal matters. Counsel, without offering sufficient reason or argument, requests that this court strike the $1,000.00 limitation provided under § 43-2419 as being a violation of due process and of appellant's right to the effective assistance of counsel. We reject appellant's request to reach the question concerning the constitutionality of § 43-2419, but we do recognize counsel's entitlement to the maximum award under that provision. Thus, because the trial court allowed only $650.00 for the actual trial on resentencing, we direct the trial court to award an additional amount in the sum of $350.00. We decline counsel's suggestion that this court award his fees in advance of the second resentencing trial.

Appellant raises two additional points we recently addressed and decided in *Duncan* v. *State*, 291 Ark. 521, ___

S.W.2d ___ (1987), *viz.*, that Arkansas's sentencing laws for capital murder are death-mandatory provisions prohibited by *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), and that the prosecutor is not entitled to a second closing argument under such sentencing laws. In *Duncan*, *supra*, we rejected the contention that Arkansas's statutory scheme provides for a mandatory death penalty when the jury finds the aggravating circumstances outweigh mitigating circumstances. *See* Ark. Stat. Ann. §§ 41-1301 to 41-1304. As we pointed out there, the jury, irrespective of its findings under these provisions, can still return a life verdict without parole simply by rejecting the death penalty. *See also Hill* v. *State*, 289 Ark.387, 713 S.W.2d 233 (1986). We also held in *Duncan*, *supra*, that the prosecutor had the right to close the argument in the penalty phase because the State had the burden of proof. Because we have already disposed of these points in *Duncan*, *supra*, no further discussion is required.

Appellant concludes his argument for reversal of this cause by listing a mixture of issues captioned "other claims." None of these claims have merit.

Appellant first argues that he was prejudiced because he was led into the courthouse in handcuffs. To note the obvious, appellant's case was one of resentencing, only, and the jury was quite aware that appellant was guilty of capital murder since that was the very crime for which the jury was convened to impose a penalty. We fail to see how prejudice would result from a juror's view of appellant in handcuffs when that juror already knows the appellant had been convicted of murder nearly nine years earlier. As was said by the court in *United States ex rel. Stahl* v. *Henderson*, 472 F.2d 556 (5th Cir.) *cert. denied*, 411 U.S. 971 (1973), "No prejudice can result from seeing what is already known." *See also Glick* v. *State*, 286 Ark. 133, 689 S.W.2d 559 (1985).

Next, appellant contends the prosecutor erred in referring

to himself as representing "the people" and arguing to the jury that the death penalty is a deterrence and making other remarks appellant considers were designed to prejudice his case. Appellant submits no case authority and little argument to convince us these matters were errors, requiring the reversal of this cause. Neither do we find merit in appellant's expressed attempt to preserve his argument that death-qualified juries are unconstitutional since that issue has been decided against him. *Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986). The same can be said for his contention that the death penalty is cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984).

As previously mentioned, we reverse and remand for resentencing consistent with the directions and holdings set out herein.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree with the majority decision; we have no alternative but to reverse this case. However, I would go further and address the question raised by *Collins* v. *Lockhart*, 754 Fed. 258 (8th Cir.) *cert. denied* ___ U.S. ___, 106 S.Ct. 546, 88 L.Ed:2d 475 (1985). I would not follow the rationale of that decision which has been rejected by other federal and state courts. *Glass* v. *Blackburn*, 791 F.2d 1165 (5th Cir. 1986); *Wingo* v. *Blackburn*, 783 F.2d 1046 (5th Cir. 1986); *Evans* v. *Thigpen*, 631 F. Supp. 275 (S.D. Miss. 1986); *State* v. *Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). The Eighth Amendment to the United States Constitution simply says "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Circuit Court of Appeals has indeed strayed a long way from that principle by finding that simply because an element of capital felony murder will be an

aggravating circumstance, such a circumstance makes the death penalty unconstitutional.

If a state decides to limit the death penalty, as Arkansas has done to those who commit murder during the commission of certain felonies, in this case robbery, that is not such an arbitrary, broad category of criminal misconduct that fails or should fail the guidelines laid down by the United States Supreme Court. *Furman* v. *Georgia*, 408 U.S. 238 (1972); *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). A jury may still decide not to impose the death penalty.

It is ironical that the few death penalty cases which will slip through the interminable appeal process will mean that those defendants are simply unlucky. The reason for their fate will not be because they deserve the death penalty more than the great majority who are spared that penalty, but because there are no technical reasons left to throw out the death penalty in their case. Is this a fair way to decide who will get the death penalty? It seems a far more freakish way to impose the death penalty than to leave that decision to juries within reasonable guidelines.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF
ARKANSAS

June 29, 1987

Clint Miller
Assistant Attorney General
Heritage West Building
201 East Markham
Little Rock, AR 72201

Re: CR86-42 Edward Charles Pickens v.
State of Arkansas

Dear Mr. Miller:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Hickman, J., would grant."

Sincerely yours,

/s/ Dona L. Williams, Clerk

APPENDIX C

Supreme Court of the United States

No. A-70

ARKANSAS,

Applicant,

v.

EDWARD CHARLES PICKENS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 30, 1987.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 24th day of July, 1987.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF ARKANSAS — PETITIONER

VS. — NO. 87-357

EDWARD CHARLES PICKENS — RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes Edward Charles Pickens, through counsel serving pro bono publico, and for his Motion for Leave to Proceed In Forma Pauperis states:

1. Respondent is incarcerated in the Arkansas Department of Correction Death Row in Tucker, Arkansas. He is indigent. He proceeded in forma pauperis in the United States District Court and in the Court of Appeals for the Eighth Circuit in the proceedings resulting in the state court resentencing from which this petition by Arkansas stems. Undersigned counsel served by appointment in the trial court and on appeal to the Arkansas Supreme Court; the opinion of the Court in Petitioner's appendix indeed refers to matters litigated regarding compensation of counsel. Counsel is filing this Response pro bono. Throughout the twelve years of the proceedings of this case, Respondent has been represented by counsel serving by appointment or pro bono.

2. For some reason unknown to counsel, Petitioner has not executed a recent in forma pauperis affidavit. The

situation may be related to recent correspondence which has given counsel concern about Respondent's mental state. Counsel will endeavor to get Respondent to execute a more recent affidavit. As counsel reads Rule 46.1, since Respondent proceeded in forma pauperis in the District Court and Court of Appeals, a new affidavit is not necessary.

WHEREFORE, it is prayed that this Response be permitted in forma pauperis.

EDWARD CHARLES PICKENS

JEFFREY M. ROSENZWEIG
300 Spring Building, Suite 500
Third & Spring Streets
Little Rock, Arkansas 72201
(501) 372-5247

Attorney for Respondent
pro bono publico

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, attorney for Respondent, hereby certify that a copy of the foregoing Motion was mailed by first class mail postage prepaid to Clint Miller, Assistant Attorney General, Heritage West Building, Markham and Scott Sts., Little Rock, Ark. 72201 this 28 day of September, 1987.

JEFF ROSENZWEIG

No. 87-357

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS — PETITIONER

VS.

EDWARD CHARLES PICKENS — RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JEFFREY M. ROSENZWEIG
300 Spring Bldg. Suite 500
Little Rock, Ark. 72201
(501) 372-5247

Attorney for Respondent
pro bono publico

QUESTION PRESENTED

WHETHER THE FIFTH, SIXTH, FOURTEENTH AND MOST PARTICULARLY THE EIGHTH AMENDMENTS, AS APPLIED THROUGH THE FOURTEENTH AMENDMENT, PERMIT A CAPITAL DEFENDANT TO PRESENT EVIDENCE OF MITIGATING POST-OFFENSE BEHAVIOR IN A CAPITAL SENTENCING PROCEEDING, OR WHETHER THIS COURT SHOULD OVERRULE SKIPPER V. SOUTH CAROLINA.

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The Supreme Court should deny the petition for certiorari because the Arkansas Supreme Court's decision was a proper application of the rule of Skipper v. South Carolina, 476 U.S.____, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986) and specifically contemplated by Skipper and its progeny and predecessors; that the decision stands on valid constitutional footing; that the Arkansas court never decided the independent state grounds also presented to it for review; and that full treatment hereof would be a waste of this Court's scarce time, since even if Arkansas' argument were sustained here, Pickens would have a new resentencing proceeding on independent state grounds for which Arkansas is not seeking certiorari here.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS PETITIONER

VS. No. 87-357

EDWARD CHARLES PICKENS RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Arkansas, Pickens v. State, Ark. 362, 730 S.W.2d 230 (1987) is reprinted in Petitioner's appendix.

JURISDICTION

This Court has jurisdiction to review the issue presented by Arkansas. It should be noted that in this capital resentencing proceeding, Pickens' sentence was reversed on an independent state ground (error in jury selection) as well as the ground presented here by Arkansas. Arkansas seeks no review of the independent state ground, and this Court would have no jurisdiction of that anyway.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> "(N)or be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..."

The Eighth Amendment to the United States Constitution states in pertinent part:

> "(N)or cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> "(N)or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Pickens agrees in essence with Arkansas' statement of the case.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISION OF THE ARKANSAS SUPREME COURT IS SPECIFICALLY GROUNDED AND CONTEMPLATED IN SKIPPER V. SOUTH CAROLINA AND ITS PROGENY; THAT IT IS SPECIFICALLY GROUNDED IN THE UNITED STATES CONSTITUTION, THAT THE DECISION DOES NOT CREATE A RANDOM RESULT; AND THAT IT WOULD BE A WASTE OF THIS COURT'S RESOURCES TO GRANT CERTIORARI ON A CASE THAT WILL BE RETRIED WHATEVER THIS COURT DOES.

Edward Charles Pickens was convicted of Capital Murder and sentenced to death by the Circuit Court of Prairie County, Arkansas in 1976. In 1984, the United States Court of Appeals for the Eighth Circuit vacated the death sentence and remanded the case for a resentencing proceeding. Pickens v. Lockhart, 714 F.2d 1455 (1983). The basis for the vacation was the failure of Pickens' original trial counsel to present evidence of the difficult and violent circumstances in which Pickens was reared. A first attempt at resentencing in 1984 was aborted by a mistrial during jury selection. In 1985 a resentencing was held and he was again sentenced to death.

During the 1985 resentencing trial, the trial court refused to permit Pickens to introduce testimony of various family members and friends --- including a Catholic lay deacon with whom he had worked in prison and a schoolteacher with whose classes he had corresponded --- regarding his rehabilitation, progress and good works

since the date of the offense in 1975. Additionally, the trial court excised from the videotaped testimony of a prison psychologist all references to matters occurring after the date of the offense, October 20, 1975.

Pickens objected, of course, to the refusal of the trial court to allow presentation of the testimony. Pickens based his position on several grounds: that the Constitution, as then most recently construed in the Eighth Amendment cases of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) required introduction of the evidence, that he had a right to present a defense, that the Arkansas statute (Ark. Stat. Ann. 41-1301 et seq.) mandated that he be allowed to introduce it, and that the prosecuting attorney had made it relevant by asking voir dire questions about holding someone responsible after a lapse of years.

While the case was on appeal, the Supreme Court decided Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Pickens presented the Skipper decision, which relied on Lockett and Eddings as did he at the trial court, and the Arkansas Supreme Court unanimously reversed on Skipper grounds.

That decision was correct and should not be reviewed by this Court. In addition to the original Skipper decision. This Court has reaffirmed the Skipper holding and its underlying rationale in several cases since. Truesdale v. Aiken, 480 U.S. _____, 107 S.Ct. 1394, 94 L.Ed.2d 539

(1987). In two other cases, the Court, through the device of the summary reversal, sent back to the trial court two cases where the proffered mitigating circumstances occurred after the first trial. Koon v. Aiken, 480 U.S. _____, 107 S.Ct. 1599, 94 L.Ed.2d 786 (1987). Patterson v. Aiken, 480 U.S. ____, 107 S.Ct. 1598, 94 L.Ed.2d 785 (1987). In Hitchcock v. Dugger, ____ U.S. _____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) the Supreme Court again reiterated the right to present all mitigating evidence.

It is clear that Skipper is not some sort of bizarre and aberrational holding, but rather one with vitality and reason commending it to the Court. It did not pop in out of thin air, but is firmly based on Fifth, Sixth and most particularly Eighth Amendment jurisprudence.

The right to present a defense is a paramount, fundamental one under due process-compulsory process-confrontation analysis superseding procedural bars. Chambers v. Mississippi, 410 U.S. 284 (1983). Washington v. Texas, 338 U.S. 14 (1973). A sentencing proceeding is one where all due process rights attach. Gardner v. Florida, 430 U.S. 349 (1977). Lockett and Eddings are affirmations of these tenets. Skipper and its progeny merely are applications of these rules to a particular type of evidence.

There is nothing in Skipper to prevent a prosecuting attorney from arguing, in support of the imposition of a death penalty, that the circumstances of the offense

outweigh any particular efforts a defendant may have made to change his ways. But death is different. Furman v. Georgia, 408 U.S. 238 (1972). A capital sentencing determination requires a higher degree of scrutiny for correctness in the particular case, not a lesser one. California v. Ramos, 463 U.S. 992 (1983). A capital defendant should not have any less right of allocution to the sentencer than a burglar or thief.

Arkansas argues that it is somehow unfair to single out, or to permit to be singled out, certain persons to derive benefit from reversed cases. That is a strong argument for abolition of the death penalty, but assuming for purposes of argument that the Supreme Court is not going to do that, there is no qualitative difference in that and the countenancing of different types of capital statutes in which an offense may be capital in one state and non-capital in another or a circumstance aggravating in one state and not in another. Gregg v. Georgia, 428 U.S. 153 (1976). Proffitt v. Florida, 428 U.S. 242 (1976). Jurek v. Texas, 428 U.S. 262 (1976). Or its rejection of mandatory dispositions for certain offenses. Woodson v. North Carolina, 428 U.S. 280 (1976). Roberts v. Louisiana, 428 U.S. 325 (1976). Sumner v. Shuman, ____U.S. ____, 107 S.Ct. 2716,____L.Ed.2d _____(1987). Or its rejection of mandatory comparative review. Pulley v. Harris, 465 U.S. 37 (1984). Or its rejection of allegation of systemic racial bias under the holding that

it is the individualized consideration that is to be examined. McCleskey v. Kemp, _____U.S. _____, 107 S.Ct. 1676, 95 L.Ed.2d. 262 (1987).

The Arkansas Supreme Court's decision in this case does not deviate from the line of cases and thinking upon which it is based. But even if the Court were to decide to re-examine the Lockett-Eddings-Skipper-Hitchcock line of cases, this is one the case to do so. Because of error in the jury selection process, Pickens is going to have a new resentencing trial in any event. It would be a waste of this Court's precious resources of time to accept this case for full argument.

CONCLUSION

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

EDWARD CHARLES PICKENS

By: _____

JEFFREY M. ROSENZWEIG
300 Spring Bldg. Suite 500
Little Rock, Ark. 72201
(501) 372-5247

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, attorney for Respondent, hereby certify that a copy of the foregoing Response was mailed by first class mail postage prepaid to Clint Miller, Assistant Attorney General, Heritage West Building, Markham and Scott Sts., Little Rock, Ark. 72201 this 28 day of September, 1987.

JEFF ROSENZWEIG